



# Security Over Jersey Immovable Property | 1

VOISIN LAW

In Jersey, property can be classified in a number of different ways. For example, as either movable (*meubles*) or immovable (*immeubles*), or as tangible or intangible; these distinctions determines what types of security one may take over property.

In simple terms land is real estate and immoveable and all other property moveable. Tangible moveable property would include cars or paintings or coins whereby security can only be affected by pledge. Intangible moveable property would include items such as Shares in a Company.

With regards to immovable property, that is, real estate, there are two main ways to create security over the property, these being:

- If the property is freehold, flying freehold or leasehold, the form of security will be a “Hypothec”, which is a form of security with similar characteristics to a charge under English law, where the secured property remains with the borrower; and
- if the property is a “share transfer property”, (that is where, for example, a block of flats are owned by a Jersey holding company and the company’s constitutional documents state that the holder of a block of shares will have rights of exclusive use and occupation to a certain flat), the form of security will be a security interest agreement created under the Security Interests (Jersey) Law 2012.

The former is the most common way of creating security over immovable property in Jersey.

## Types of Hypothec

There are three types of Hypothec which exist under the law of Jersey:

- Legal Hypothec
- Judicial Hypothec
- Conventional Hypothec

The Hypothecs which are directly concerned with the advancing of money on the security of immovable property are the Judicial Hypothec and the Conventional Hypothec.

## Judicial Hypothec

The Judicial Hypothec arises through the obtaining of a Judgement for the acknowledgement of a borrowing, which borrowing may be evidenced by a Bond or Promissory Note. The Judgement must be for a defined sum of money and once obtained it must be registered in the Public Registry in order to secure the borrowing over the immovable property of the borrower. The obtaining of a Judgement and its registration is done in one and the same document called a “Billet” which is signed by both parties. The Judicial Hypothec may be charged over all the Real property of the borrower in the Island or over a specific property in which event the specific property will be described in the Billet. The Judicial Hypothec dates from the date of Judgement if it was registered on that date or if it is so registered within the next 15 days and in any other case from the date of registration. This allows for example two borrowings which take place on the same day to be secured on the immovable property of the borrower in a certain order. Thus a Judgement registered on the day it was obtained will rank before a borrowing which is registered more



VOISIN LAW

than 15 days after that date.

It is to be noted that the Judicial Hypothec has a maximum life of 10 years and accordingly any loan which is intended to last longer than 10 years and which is secured by way of a Judicial Hypothec will have to be re-registered before the expiry of the 10 year period. This will involve additional stamp duty and fees which is mentioned below under the heading "Costs".

It is also to be noted that as the Judicial Hypothec must be registered for a defined sum any interest which accrues on the capital over and above the defined sum is not secured by the Judicial Hypothec over the immovable property of the borrower unless a further registration takes place for that additional amount.

### **Simple conventional hypothec**

Turning to the conventional Hypothec this results from the agreement of the parties, and is created in one of two ways. The first is when a property is sold and part of the purchase price is not paid over, but is left as a charge on the property payable by the buyer to the seller.

The second way is when the owner of the property creates a charge on it subsequent to its acquisition.

The conventional Hypothec relevant to securing advances of loan moneys is called the Simple Conventional Hypothec (known as the "**HCS**"). As in the case of a Judicial Hypothec the Simple Conventional Hypothec must be for a specific sum and any accrued interest over and above that sum is unsecured.

An HCS can only be created by means of a contract passed before the Court and only by the person who has the power to alienate the property. Thus just as a joint owner of property cannot unilaterally alienate his own interests, it follows that he cannot unilaterally create an HCS. This applies equally to Judicial Hypothecs. The HCS dates from the date on which the contract is passed and once created can only be transferred to a third party by means of a contract passed before the Court and is extinguished by means of a Deed registered in the Public Registry signed by the Lender acknowledging repayment of the loan.

The terms of the borrowing are set out in the contract by which the HCS is created.

The lender may demand payment of an HCS at any time if the contract is silent or after a specified period not exceeding 30 years whereas a borrower may repay a HCS at any time if the contract is silent or after a specified period not exceeding 20 years. The Hypothec itself remains in force until the borrower's obligation is extinguished.

### **General**

It is to be noted that the principal differences between a Judicial Hypothec and a Conventional Hypothec is that a Judicial Hypothec only lasts for 10 years whereas a Conventional Hypothec can last for a maximum period of 30 years, Furthermore, the terms of the borrowing has to be set out in the Conventional Hypothec and is thus open to Public inspection whereas the Judicial Hypothec is merely an acknowledgement of a private borrowing, the details of which are a matter between the Lender and



VOISIN LAW

Borrower. As hereinafter mentioned under the heading of the Costs the Judicial Hypothec has a further advantage over the Simple Conventional Hypothec. Most Bank borrowings are done by way of Judicial Hypothec.

It is to be noted that it is now possible to mortgage a Contract Lease (being a Lease of nine years or more), however, this is not in common use due to the fact that either the Lease has to allow the Lessee to mortgage the Lease, of which there are very few Leases of this type in existence, or the landlord has to be party of the mortgage in order to agree to the borrowing being secured, which may prejudice his rights.

Finally, in regards to the above mentioned Hypothecs it must be remembered that they may only apply to the land itself and only if presently owned. They also apply to flats provided that the flats are subject to the terms of "Loi (1991) Sur la Co-propriété des Immeubles Bâtis" that is flying freehold. Prior to the introduction of this Law, flats could only be conveyed by way of the sale of a block of shares in the company which owned the building within which the flat was situate, the Lendor securing a borrowing over the flat by way of taking a security interest over the relevant block of shares. This system is still very much in existence as most of the flats in private ownership are owned in this manner.

### Costs

Stamp duty is payable by the borrower on an HCS at the rate of  $\frac{1}{2}\%$  of the capital value of the loan. Legal fees, on a scale set down by the Royal Court amount to another  $\frac{1}{2}\%$  of the capital value. Legal fees are chargeable by both the borrowers' and banks' lawyers and as banks normally pass on legal fees to the borrower, he will have to pay a full 1% of the value of the loan in legal fees.

Although  $\frac{1}{2}\%$  stamp duty is payable on the capital value of a loan by way of bond a Judicial Hypothec is by far the more economical arrangement from the Borrower's viewpoint and this is particularly so for a large transaction. This is because no scale of legal fees are set down and accordingly fees are open to negotiation: generally they tend to be more in the region of a  $\frac{1}{4}\%$  rather than a  $\frac{1}{2}\%$  or are charged on time costs basis. The re-registration of a Judicial Hypothec will also attract stamp duty at  $\frac{1}{2}\%$  of the amount outstanding at the date of re-registration.

### Realising Security

Should a borrower appear to be unable to meet his repayment, a secured party has two options available to him namely, to proceed towards a "dégrèvement" or to institute désastre proceedings.

The nature of a dégrèvement is best shown by the procedure a creditor must invoke:

- Judgement must be taken against the borrower (this is so even though the creditor has an Hypothec on the property already);
- After one month, and if the borrower has not repaid, the creditor proceeds to ask the Royal Court for permission to instruct the Viscount (the executive officer of the Court) to write to the borrower requiring him to settle his debt within two months. The order of the Court is known as an "acte Vicomte chargé d'écrire";
- If no payment is forthcoming the creditor must apply to the Court after the expiration of the two



VOISIN LAW

month period for an order to have the debtors immovable property adjudged renounced.

- The Judicial Greffier will fix a date for the dégrèvement hearing which must be between four to six weeks after the date of the Order referred to in paragraph 3 above and notices are placed in the local papers notifying other creditors to insert their claim;
- At the hearing before the Judicial Greffier, the unsecured creditors (if any) are asked if they wish to take the debtors property as “tenant” or to renounce their claim. If they take the property they will do so as full owners subject to all prior charges. After the unsecured creditors the holder of the most recent charges are called, and so on.

Although the tenant is bound to pay off all previous charges on a property, he is not required to pay any difference there may be between the value of the property and the level of his claim or charge by which he took as tenant. If a secured creditor does not claim himself tenant (when called upon in accordance with the date of his charge) he will lose his charge and will be in the position of an unsecured creditor of the debtor.

In order to offset the consequent hardship of a dégrèvement caused by the lack of an equity of redemption, the debtor has recourse to a procedure known as “remise des biens” by which the dégrèvement procedure is delayed. This is usually subject to an initial maximum period of one year but extensions may be granted. However, to avail himself of the benefit of the remise, the borrower is required to satisfy certain conditions the most important which is that the value of immovable property must exceed the level of the Hypothecs thereon.

An alternative route for the borrower to take is to declare the debtor “en désastre”. An application may be made by an unpaid lender under the terms of the Bankruptcy Désastre (Jersey) Law 1990 for a declaration that the debtor be declared en désastre with the consequent effect that all property (whether immovable or moveable) together with all powers of the debtor vest in the Viscount.

Any immovable properties vested in the Viscount shall so vest subject to all Hypothecs and debts secured thereby to which such property was subject prior to the vesting. Under the terms of the 1990 Law creditors who are secured by way of Hypothec over immovable property are entitled to a preference upon the proceeds of sale of any property upon which their respective Hypothecs are secured.

Where a property is the subject of several Hypothecs entitlement to a preference or HCS is in the order of the date of creation of the respective Judicial Hypothecs upon the proceeds of sale of the property. In the event that the proceeds of sale of the property upon which any Judicial or Conventional Hypothec is secured are insufficient for the claim of any secured creditor the balance shall rank for payment equally with all other debts proven in the bankruptcy proceedings.

For further information on property matters in Jersey, please contact [Ian Strang](#) or [Jeffrey Giovannoni](#) of Voisin.



VOISIN LAW

## Security Over Jersey Immovable Property | 5

*This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.*